

On three occasions during the intersessional period between the second and third parts of the 28th Session of the Council of the International Seabed Authority, the intersessional working group on underwater cultural heritage (“UCH”) met to discuss various textual proposals and other elements pertaining to UCH in the draft exploitation regulations. The group used as the basis of its discussions a set of 12 bullet points that the group’s facilitator produced at the end of the previous intersessional period (between the first and second parts of the 28th Session of the Council). The group was unable to come to a consensus on the 12 bullet points during that previous intersessional period, the group agreed to use those bullet points to inform its discussions during the current intersessional period. Those 12 bullet points are contained in pages 12 to 15 of the outcome report from the previous intersessional period, accessible here: <https://www.isa.org.jm/wp-content/uploads/2023/06/Underwater-Cultural-Heritage-Outcomes-report.pdf>.

The following are the facilitator’s meeting notes from the three meetings of the group during the current intersessional period, as shared with the group:

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#### MEETING 1 (24 August 2023, EDT / NY Time)

Working on the basis of the 12 bullet points that came out of this group at the end of the previous intersessional period, the participants in the meeting focused on the five sets of questions/issues the facilitator previously shared with the group as guidance for the discussion. Specifically, the participants discussed the following (comments from the meeting are in boldface following each set of questions/issues):

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1) Should there be a new legal term of art pertaining to underwater cultural heritage -- e.g., "Objects or Sites of an Archeological or Historical Nature" -- separate from existing terms such as "Marine Environment" in the exploitation regulations, and if so, how should the term be expressed and/or defined in the exploitation regulations, including with respect to the sort of action verb(s) associated with the term (e.g., protect, preserve, dispose)?

**-- A participant indicated openness to seeing a term or terms referencing human remains and objects/sites of an archaeological or historical nature in the exploitation regulations, but the term(s) should not be defined in the Schedule. Instead, the exploitation regulations should follow the approach in the exploration regulations, which reference such human remains and objects/sites (e.g., in exploration regulation 35 for polymetallic nodules) without defining them as a legal term of art. The participant also did not support folding in such human remains and/or objects/sites into the definition of "Marine Environment" in the exploitation regulations. The participant indicated openness to the sort of action verb(s) to associate with references to human remains and objects/sites.**

**-- A participant echoed the need to be consistent with the relevant exploration regulation(s).**

**-- A participant noted that the exploitation regulations should build on the exploration regulations, where appropriate, rather than merely copy them.**

2) Should there be a requirement to include Objects or Sites of an Archeological or Historical Nature (whether or not as a legal term of art, and without prejudice to the exact formulation of the term) in baseline surveys and/or environmental impact assessments conducted pursuant to the exploitation regulations, and if so, how?

**-- A participant opposed any requirement that such objects/sites be included in baseline surveys. The participant noted, however, that such objects/sites could be included in the relevant part(s) of an Environmental Impact Statement, as currently reflected in Annex IV of the draft exploitation regulation.**

**-- A participant proposed that baseline surveys should contain such objects/sites, as part of the overall objective of preserving and protecting the marine environment, with such objects/sites being elements of that marine environment.**

**-- A participant pointed out the relevance of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage as well as the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, and underscored that UNCLOS contemplates linkages between itself and other instruments such as the UNESCO Conventions, including the implementation of the latter in a manner that is consistent with the implementation of obligations under the former.**

**-- A participant queried what level would be expected if such objects/sites are mandated for inclusion in baseline surveys, and what the practical implications of such an approach would be. The participant offered to discuss the matter off-line with another interested participant prior to the next meeting of the intersessional working group.**

**-- A participant stressed that underwater cultural heritage should not be limited to "tangible"/discrete matters such as historical objects, relics, and similar items. Rather, culture is living, dynamic, and much more than "static" elements of the marine environment. Thus, including "tangible" objects/sites in baseline surveys, for example, would not be sufficient to capture the full scope of cultural heritage associated with the marine environment. In response, a participant queried whether this notion of a living, dynamic cultural connection with the marine environment, if it is not suitably captured by the concept of "traditional knowledge," might instead/also be captured as part of the references to "sociocultural matters" in the draft exploitation regulations, such as in Annex IV on the Environmental Impact Statement.**

3) Should language on protecting/preserving/disposing of Objects or Sites of an Archeological or Historical Nature (whether or not as a legal term of art, and without prejudice to the exact formulation of the term) be included with respect to test mining, and if so, how?

**-- A participant opposed including language relating to such objects/sites in any exploitation regulation on test mining, noting that such a regulation must instead focus**

on testing the soundness of mining equipment, verifying the suitability of mining technique(s), verifying the economic viability of the anticipated mining, and evaluating potential environmental impact of the mining (with the "environment" being defined in a manner that would not include such objects/sites).

-- Two participants stressed that test mining should not be seen as merely a test-drive exercise that is wholly separate from typical industrial-level mining, including in terms of environmental impacts; and that such test mining must take into consideration cultural connections to and valuations of the affected marine environment, including relevant cultural permission protocols.

-- A participant noted ongoing discussion on test mining in a separate intersessional working group, where there might be some openness to considering underwater cultural heritage matters (particularly in terms of human remains and/or "tangible" objects/sites) as part of a Standard and/or Guideline contemplated under draft exploitation regulation 48ter. It might be a bit premature, according to that participant, for the UCH intersessional working group to coalesce around a particular proposal on test mining in light of that parallel (and more focused) discussion in the test mining intersessional working group.

4) Should exploitation regulation 28(3) retain a reference to the need to protect/preserve/dispose human remains and Objects or Sites of an Archeological or Historical Nature (whether or not as a legal term of art, and without prejudice to the exact formulation of the term) as a basis for reducing/suspending Commercial Production, and if so, how?

-- Two participants pointed out that draft exploitation regulation 35 already contemplates in a focused/dedicated manner the halting of exploration and exploitation upon discovery of such human remains, objects, and sites in a Contract Area, and so they queried whether there needs to be a similar reference in draft exploitation regulation 28(3) to the suspension of Commercial Production to deal with such remains, objects, and sites.

-- Several participants supported the notion of including whale falls alongside human remains and "tangible" objects/sites of an archaeological/historical nature in the scope of draft exploitation regulation 28(3). They noted that just as a person's soul remains in the person's bones after passing, so too does the sacred power and soul of a culturally significant marine creature such as a whale persist in the whale's remains after passing. On a related note, a participant stressed the need to avoid taking a highly compartmentalized approach to understanding the marine environment and the cultural connections of humans to it, underscoring that human culture is living and dynamic rather than stagnant and should not be neatly captured as either just "tangible" or just "intangible."

5) Should the exploitation regulations address cultural heritage matters of a more "intangible" nature (relative to more "tangible" Objects or Sites of an Archeological or Historical Nature), such as cultural values associated with the deep sea, traditional/Indigenous knowledge about marine biodiversity and the overall marine environment in/associated with the deep sea, cultural/traditional/Indigenous practices associated with the deep sea, and the attendant rights

of Indigenous Peoples and local communities in relation to such values/knowledge/practices, and if so, how?

**-- A participant strongly responded in the affirmative to this question, emphasizing that the ISA (and UNCLOS in general) has not given proper consideration to cultural values associated with the deep sea, traditional/Indigenous knowledge about marine life and the overall marine environment connected with the deep sea, cultural practices associated with the deep sea, and related rights of those who hold/practice such values/knowledge/practices. The participant insisted that there has to be a paradigm shift in ISA approaches to the deep sea, taking fully into consideration the views of Indigenous Peoples and providing space for them to participate fully in the development of exploitation regulations and their possible future implementation, rather than perpetuating long-standing political barriers to such participation in UNCLOS and related intergovernmental fora and processes. Another participant called for a suitable updating of UNCLOS in this regard, with appropriate reflection of intergenerational equity that leaves the Ocean better for future generations.**

**-- A participant expressed openness to the exploitation regulations dealing with "intangible" underwater cultural heritage in some manner, in line with bullet point 12 from the previous intersessional period, as long as it is understood that the regulations are a legal instrument that need to conform to certain legal forms/approaches, must not impose obligations on Contractors beyond those contemplated by UNCLOS, and must not be impractical. Another participant opposed any specific reference to "intangible" underwater cultural heritage in the exploitation regulations, stressing that it is not appropriate to obligate Contractors to deal with the matter, and that in any case, the exploitation regulations are not the appropriate instrument to address the matter.**

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After discussing the five sets of questions/issues, the participants agreed to convene another meeting of the intersessional working group toward the end of this week, which will focus on the issue of "intangible" underwater cultural heritage. For that meeting, proponents for language on such "intangible" underwater cultural heritage are encouraged to propose such language in advance of the meeting for the consideration of participants at the meeting. If there is enough time remaining in this week's meeting, participants will also discuss "tangible" underwater cultural heritage, building on last week's discussion and using an updated version of the 12 bullet points reflecting last week's discussion. Depending on this week's meeting, the plan is for the group to have a third meeting toward the end of next week that will consider all elements of the UCH issue and possibly draft some textual proposals, and then have a fourth and final meeting the week after that to review such possible textual proposals, in advance of the 15 September submission deadline.

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MEETING 2 (5 September 2023, EDT / NY Time)

Earlier this week, members of this group met to discuss the issue of "intangible" underwater cultural heritage. We used five questions from the facilitator as guidance for the discussion. The questions and the discussions they prompted are the following:

1) Should the exploitation regulations (including, potentially, relevant Standards and/or Guidelines) address "intangible" underwater cultural heritage?

-- **Several participants voiced support for the inclusion of language in the exploitation regulations addressing "intangible" underwater cultural heritage. Reference was made to the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage ("ICH Convention"), which currently has 180 Parties; as well as to the 2001 Convention on the Protection of Underwater Cultural Heritage, which currently has over 70 Parties. Reference was also made to article 303 of UNCLOS, which, among other things, establishes a duty to protect objects of an archaeological and historical nature found at sea and stresses that the article is "without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature"; as well as to article 149 of UNCLOS, regarding the preservation or disposition of such objects found in the Area. Although articles 149 and 303 refer to "objects," it was mentioned in the discussion that there are cultural and other "intangible" values associated with physical "objects," including "objects of an archaeological and historical nature." Additionally, it was recalled that the exploration regulations reference human remains as well as sites in addition to "objects" in the context of implementing articles 149 and 303 of UNCLOS, thus establishing a precedent for building on the language in UNCLOS (without undermining/contradicting that language) rather than being limited to the specifics of that language when implementing articles 149 and 303. A comment was also made about the recently-adopted BBNJ Agreement and its extensive references to the traditional knowledge of Indigenous Peoples and local communities as being relevant to areas beyond national jurisdiction (including the Area) and the marine biological diversity thereof, all of which should be considered in the context of exploitation regulations for the Area.**

2) Assuming that the answer to the first question is "yes," is it necessary to define the concept of intangible underwater cultural heritage in the exploitation regulations, and if so, what would be an appropriate definition?

-- **A number of participants supported the use of a definition for "intangible" underwater cultural heritage and proposed using the definition of "intangible cultural heritage" from article 2(1) of the 2003 UNESCO ICH Convention as the basis for a possible such definition (noting that the ICH Convention definition does not explicitly reference underwater elements). It was mentioned that using such a definition from the ICH Convention would provide sufficient clarity to ISA actors and facilitate harmony between the work of the ISA and other relevant instruments and processes, including those under UNESCO.**

-- **A participant drew the group's attention to the United Nations Declaration on the Rights of Indigenous Peoples, particularly its article 31 (recognizing the right of**

**Indigenous Peoples to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions, as well as establishing the obligation of States to cooperate with Indigenous Peoples in taking effective measures to recognize and protect the exercise that right) and article 32 (obligating States to obtain the free, prior and informed consent of Indigenous Peoples pertaining to the approval of any project affecting their lands or territories and other resources).**

3) Are references to the relevant traditional knowledge of Indigenous Peoples and local communities in the (draft) exploitation regulations sufficient to capture the notion of "intangible" underwater cultural heritage?

4) Are references to "sociocultural" uses/environment/impacts in the (draft) exploitation regulations, including in Annex IV on an EIS as well as in other regulations pertaining to environmental documents, sufficient to capture the notion of "intangible" underwater cultural heritage?

**-- Participants addressed questions 3 and 4 together.**

**-- A participant noted that while the references to traditional knowledge and sociocultural uses/environment/impacts in the draft exploitation regulations might be broad enough to encompass "intangible" underwater cultural heritage, they might not be specific or clear enough stand-ins for "intangible" underwater cultural heritage for ISA actors, particularly Contractors and Sponsoring States, whereas a standalone and defined term for "intangible" underwater cultural heritage might provide greater clarity and certainty compared to currently undefined "traditional knowledge" and "sociocultural" elements.**

**-- Another participant pointed out that the matter of "intangible" underwater cultural heritage is of a cross-cutting nature with relevance throughout the entirety of the exploitation regulations, including with respect to the rights of Indigenous Peoples, and the matter should not be limited to regulations on EISes and other environmental documents/regulations.**

**-- On the other hand, a different participant reiterated their opposition to referencing "intangible" underwater cultural heritage per se in the exploitation regulations, noting that they could not see how it would be possible to define such a concept and implement it via the exploitation regulations. While clarity for Contractors and other ISA actors is key, this participant warned that merely copying definitions and approaches from treaties and similar other normative instruments dealing with "intangible" cultural heritage into a highly technical document like the exploitation regulations is not appropriate. The participant did express openness to current references to traditional knowledge and sociocultural elements in the draft exploitation regulations, although those concepts might need to be (further) developed in a context/format other than the exploitation regulations, given their complexity. The participant also supported an effort to obligate Contractors and/or Sponsoring States to protect such traditional/cultural knowledge and ensure that access to such knowledge in the context of deep seabed mining in the Area is done in the appropriate manner.**

**-- A participant reminded the group of the relevance of the concept of intergenerational equity, as discussed in the previous meeting of the group. The participant also underscored that the lack of Indigenous participation in the development of UNCLOS as**

well as in the ISA's prior work on the Mining Code deprived the process of a deeper understanding to date of Indigenous views on the relevance of "intangible" underwater cultural heritage, which the participant hoped to help cure going forward.

-- A participant suggested that if the exploitation regulations are to rely on the references to traditional knowledge and sociocultural elements rather than on the references to "intangible" underwater cultural heritage, then there might be a need to define traditional knowledge and/or sociocultural elements in the regulations for the sake of clarity and regulatory certainty.

5) Should the exploitation regulations address the issue of rights of those who hold/value/practice such "intangible" underwater cultural heritage, including the right to participate in the development and implementation of exploitation regulations pertaining to such heritage, and if so, how?

-- A participant strongly supported the exploitation regulations addressing the issue of rights of those who hold/value/practice such "intangible" underwater cultural heritage, with a view to safeguarding and respecting such heritage when involved in exploitation activities in the Area as well as ensuring appropriate participation from interested peoples and communities in such efforts. The participant stressed the importance of consulting and cooperating with Indigenous Peoples to acquire their free, prior and informed consent in connection with activities in the Area impacting their cultural heritage, with a view to actually protecting such heritage rather than simply satisfying a checklist of actions leading to exploitation. The participant underscored that "intangible" underwater cultural heritage is not fully written, spoken, or known, with some Indigenous practices dealing with the "unknown," so there is a need for the exploitation regulations to accommodate such fluidity and indeterminacy to the extent possible, as well as for a need for relevant decision-makers, regulators, and other actors to employ an understanding spirit of "aloha" when confronted with issues for which resolution is challenging or elusive.

-- I pointed out the possibility of addressing the issue of rights, intergenerational equity, cultural stewardship of the Ocean, and other cross-cutting elements associated with "intangible" underwater cultural heritage through an exploitation regulation on general principles/approaches/policies applicable to the entirety of the exploitation regulations.

-- Other participants reiterated how "objects" of an archaeological or historical nature typically have cultural values and practices of an "intangible" nature associated with them (see, e.g., the "Kumolipo" creation chant from Hawai'i) as well as introduced the concept of "spiritual ecology" as an example of "intangible" associations with "tangible" ecological/environmental elements.

After discussing the questions, the group decided that the facilitator would put together a set of possible textual proposals and/or narratives pertaining to possible future textual proposals on "tangible" and "intangible" underwater cultural heritage for the group to consider, with a view to holding a third and final meeting of the group focusing on those proposals/narratives in advance of the 15 September submission deadline. The facilitator also invited interested members of the

group to submit to me/us any textual proposals they might have, particularly for "intangible" underwater cultural heritage.

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### MEETING 3 (13 September 2023, EDT / NY Time)

The participants who attended the meeting (which included representatives of ISA Members as well as observers) agreed that the facilitator will submit to the ISA Secretariat by 15 September the latest revised version of the 12 bullet points **[SEE AFTER THE NOTES]** as an official outcome and package of proposals from the group, for the consideration of the ISA Council at its upcoming meeting in November. The participants also agreed to attach to the submission a copy of a paper circulated by representatives of Indigenous Peoples and local communities from the Pacific, in collaboration with Greenpeace, the Te Ipukarea Society, the Blue Climate Initiative, and The Ocean Foundation, to the group prior to the third meeting. That paper, which discusses elements pertaining to intangible (underwater) cultural heritage and suggests possible language to that effect from an Indigenous perspective, will be submitted to the ISA as an information paper with a recommendation that the ISA Council considers the elements of that paper in the November meeting (and beyond), with a view toward the possibility of converting some of the language/elements in the paper into draft regulatory language at some point in the future.

Much of the meeting was devoted to a presentation of the afore-mentioned paper by Uncle Sol, an Indigenous representative. Other participants thanked Uncle Sol for the presentation and expressed support for further/focused consideration of the paper by the ISA Council in its upcoming meeting(s).

A number of members of the group communicated with the facilitator separately before the meeting to indicate that they are still developing their national positions on the issue of underwater cultural heritage and will share their views in the ISA Council this coming November. That is of course absolutely fine. As is customary, the facilitator will say, when submitting the 12 bullet points to the ISA Secretariat, that they are proposals arising out of the group's discussions, but they are without prejudice to additional inputs and possible refinements from members of the group in future meetings of the ISA Council. The facilitator will also not name individual members of the group -- he will just submit the 12 bullet points in his role as facilitator on behalf of the group (the information paper from representatives of Indigenous Peoples and local communities will retain its attribution).

[ALL MEETING NOTES END]

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In light of the discussion in the last meeting of the group, as noted above, the facilitator presents the following package of textual proposals and other inputs pertaining to existing text on UCH in



the draft exploitation regulations – specifically, in the texts used during the second part of the 28th Session of the Council in the Environment, ICE, and Institutional Matters IWGs, as well as in the Council President’s text. As indicated in the meeting notes above, participants in the intersessional working group retain the right to comment further on the package below in future Council meetings (and other contexts), including proposing new language and/or edits to the language in the package as they may see fit. The package below is presented by the facilitator to inform the development of the next iterations of the texts for the Environment, ICE, and Institutional Matters IWGs, as well as of the Council President’s text. Additionally, as indicated in the notes above, the intersessional working group wishes to forward to the Council a paper on intangible (underwater) cultural heritage from representatives of Indigenous Peoples and local communities, in collaboration with several ISA observers, for the consideration of the Council at its next meeting(s), in conjunction with the Council’s consideration of the overall issue of UCH. That paper is reproduced below the package of proposals, as a separate information paper for the Council’s consideration.

Here is the package of proposals, followed by the aforementioned information paper:

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1. Retain original version of draft exploitation regulation 35, but delete the reference to paleontological matters, open up brackets around “object or site,” retain the reference to the views of the Director General of UNESCO and any other competent international organization, and add a second paragraph to draft exploitation regulation 35 referencing the relevant work of UNESCO, building on the reference to UNESCO in the original draft exploitation regulation 35:

-- 1. The Contractor shall [immediately] notify the Secretary-General in writing within 24 hours of any finding in the Contract Area of any human remains of an archaeological or historical nature [~~and paleontological~~] nature, or any object or site of a similar nature, and its location, including the preservation and protection measures taken. The Secretary-General shall transmit such information, [within 7 Days of receiving it] to the Sponsoring State [or State], to the State from which the remains, object or site originated, if known, to the Director General of the United Nations Educational, Scientific and Cultural Organization and to any other competent international organization. [Such] human remains, object or site in the Contract Area, and in order to avoid disturbing such human remains, object or site [should be disposed of for the benefit of mankind as a whole or preserved, so that] no further Exploration or Exploitation shall take place, within a reasonable radius, [to be determined by the Authority [in consultation with the Contractor], after taking into account the views of the State from which the remains or objects originated, the Director General of the United Nations Educational, Scientific and Cultural Organization or any other competent international organization. [If the Council decides that exploration or exploitation cannot continue, the Contractor shall be compensated, including but not limited to the vicarious areas of equivalent size or value elsewhere or appropriate waiver of fees.]

**2. As part of its decision-making process in paragraph 1, the Authority shall take into account the work of the United Nations Educational, Scientific and Cultural Organization**

**with respect to underwater cultural heritage[, particularly as defined in article 1(a) of the 2001 Convention on the Protection of the Underwater Cultural Heritage].**

2. Refrain from including and defining in the Schedule on the Use of Terms the phrase "Object or Site of an Archaeological or Historical Nature" or some other definition for "underwater cultural heritage."

3. With respect to proposed references to UCH (and UCH-related matters) in draft exploitation regulations and associated Annexes pertaining to the protection and preservation of the marine environment, delete proposed references to UCH (and UCH-related matters) in:

-- draft exploitation regulation 44(1)(a)(v) (which proposes expanding the definition of "Marine Environment" to include UCH)

-- draft exploitation regulation 46bis(2)(b), as discussed in the text from the **FIRST PART** of the 28th Session of the ISA Council (which folds UCH into the definition of "Marine Environment")

-- draft exploitation regulation 46bis(4)(b), as discussed in the text from the **FIRST PART** of the 28th Session of the ISA Council (which references an affirmative obligation of a Contractor to conduct a survey of the seabed for UCH)

-- draft exploitation regulation 46ter(3)(g)(i) (which references "archaeological impacts" without explicitly connecting the reference to UCH)

-- draft exploitation regulation 47(3)(b), as discussed in the text from the **FIRST PART** of the 28th Session of the ISA Council (which also references an affirmative obligation of a Contractor to conduct a survey of the seabed for UCH)

-- Section 4.2 of Annex IV (which focuses on geophysical/oceanographic conditions of a site and does not lend itself well to anthropogenic/anthropocentric UCH references)

-- Section 4.3 of Annex IV (which requires the conducting of seabed surveys for UCH, and which is placed in a Section that focuses on geophysical/oceanographic conditions of a site)

-- Annex IVbis(c), as discussed in the text from the **FIRST PART** of the 28th Session of the ISA Council (which folds UCH under the notion of "environmental setting" as part of a Scoping Report, similar to the above-mentioned proposal to include UCH in the definition of "Marine Environment")

-- Annex VII(2)(c)(bis) (which requires the conducting of baseline studies for UCH and folds such studies under the concept of environmental baseline data as part of the suite of information to be captured in an EMMP)

4. Delete proposed definitions for "Best Archaeological Practices," "Intangible Cultural Heritage," and "Underwater Cultural Heritage" in the Schedule; delete the reference to a survey of the seabed to identify objects of an archeological and historical nature in the definition for "Environmental Management System" in the Schedule; and delete the reference to baseline studies for UCH in the definition for "Environmental Effect" in the Schedule

5. Revise draft exploitation regulation 48bis(2), as discussed in the text from the **FIRST PART** of the 28th Session of the ISA, to say the following (and defer to the intersessional working group on test mining for possible language pertaining to "tangible" underwater cultural heritage, perhaps as part of a draft exploitation regulation 48ter and/or an associated Standard or

Guideline; or, wait until after that working group finalizes its text for draft exploitation regulation 48ter proposing text there on underwater cultural heritage):

-- The purpose of test mining is to ensure that effective protection of the marine environment from harmful effects is ensured. Test mining projects shall as a general rule provide evidence that appropriate equipment is available to ensure the effective protection of the Marine Environment in accordance with Article 145 ~~and the duty to protect Underwater Cultural Heritage (specifically objects of an archaeological and historical nature) under Article 149~~

6. Revise draft exploitation regulation 49 to say the following:

-- A Contractor shall take all the necessary and appropriate measures to protect and preserve the Marine Environment and coastlines by preventing, reducing and controlling pollution and other hazards, including marine litter and underwater noise, from its activities in the Area. This is to be done in accordance with its Environmental Management and Monitoring Plan and all relevant Rules of the Authority, the relevant applicable Regional Environmental Management Plan, taking account of the applicable Guidelines.

7. In Annex IV, paragraph 6.2.5, remove the reference to UNderwater Cultural Heritage, replace it with a reference to objects or sites of an archaeological or historical nature, and refer to the work of UNESCO as captured in draft exploitation regulation 35, new paragraph 2:

-- List sociocultural uses the project area (e.g., traditional navigation routes, migratory paths of culturally significant marine species, sacred sites and waters associated with ritual or ceremonial activities of Indigenous Peoples and local communities as well as known or suspected **objects or sites of an archaeological or historical nature, taking into account the work of the United Nations Educational, Scientific and Cultural Organization referred to in Regulation 35(2)** Underwater Cultural Heritage)

8. In Annex IV, paragraph 6.3, revise as following::

-- List any sites of archaeological or historical significance that are known to occur ~~or may occur~~ within the potential area of impact. Provide a map **as applicable** showing known archaeological and historical sites in relation to proposed operations and note any areas of interaction or cumulative impact, **taking into account the work of the United Nations Educational, Scientific and Cultural Organization referred to in Regulation 35(2)**. ~~Known human connections to or uses of the area should also be acknowledged. Copies of surveys of the project area shall be submitted with notes about anomalies that may indicate the presence of objects of an archaeological and historical nature that should be subject to further research before any potentially destructive activities occur.~~

9. In Annex IV, paragraph 9.3, edit as follows:

-- Describe, as applicable, potential impacts to sites of archaeological, ~~paleontological~~ or historical significance that are known to occur within the potential area of impact, along with proposed management measures, **taking into account the work of the United Nations Educational, Scientific and Cultural Organization referred to in Regulation 35(2)**, ~~and a description of residual impacts.~~

10. With respect to proposed references to UCH (and UCH-related matters) in draft exploitation regulations pertaining to implementation, compliance, and enforcement, delete proposed references to UCH (and UCH-related matters) in:

-- draft exploitation regulation 99(1) (which folds UCH into the concept of Marine Environment)

- draft exploitation regulation 102(2)(a) (which folds UCH into the concept of environmental data, whereas the draft exploitation regulations do not typically take an anthropogenic/anthropocentric approach to defining environmental data)
- draft exploitation regulation 102(2)bis (which refers to best archaeological techniques, which is a concept closely related to the term "Best Archaeological Practices" that is proposed above for deletion from the Schedule)
- draft exploitation regulation 102(2)ter (which requires the conducting of a survey of the seabed for UCH)

11. Revise draft exploitation regulation 28(3) to say the following (with the understanding that exploitation regulation 35 already provides a process for halting Exploitation activities, including Commercial Production, in an area containing objects or sites of an archaeological or historical nature):

-- Notwithstanding paragraph 1 above, the Contractor shall [temporarily] [immediately] [reduce or] suspend production whenever such reduction or suspension is required to protect the Marine Environment from [Serious Harm or a threat of Serious Harm] or to protect human health and safety [to protect the Marine Environment from Serious Harm or a threat of Serious Harm, to protect human health and safety ~~or to protect human remains, objects or sites of archaeological or historical nature~~] [upon the receipt of emergency order pursuant to regulation [4(4) or on the Contractor's own decision that maintaining the level of production would result in Serious Harm or a threat of Serious Harm.] A Contractor shall notify the Secretary-General [and the Sponsoring State or States] [States] of such a reduction or suspension of production as soon as is practicable and no later than [72] [24] hours after production is [reduced or] suspended.

12. Participants are still considering the full scope and substance of references to "intangible" underwater cultural heritage in the exploitation regulations, including the possibility of defining "intangible" underwater cultural heritage in a manner that tracks the definition of intangible cultural heritage in article 2 of the Convention for the Safeguarding of the Intangible Cultural Heritage (which is now a universal instrument with 180 States Parties); building on (or perhaps relying on) the current references to traditional knowledge of Indigenous Peoples and local communities (as currently captured in the definition of Best Environmental Practices) and sociocultural uses/impacts in the draft exploitation regulations; language pertaining to the full and effective participation of Indigenous Peoples and local communities in the implementation of the relevant exploitation regulations; and a general principle/approach dealing with the rights and cultural values/interests of Indigenous Peoples and local communities pertaining to the deep sea. Toward this end, several participants in the intersessional working group – namely, representatives of Indigenous Peoples and local communities, in collaboration with several observer delegations – submitted a statement to the group presenting Indigenous views on how the draft exploitation regulations could address the issue of intangible (underwater) cultural heritage, include through preambular language as well in connection with six main animating ideas that could potentially form one or more exploitation regulations. The statement is reproduced below as an information paper, with the request that the Council concerns the content of the paper, with the active participation of the authors of the paper, at the next meeting(s) of the Council.

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This statement is on behalf of Indigenous Peoples and local communities, residents of Pacific Small Island Developing States to propose the below language.

We are guided by these following principles which are drawn from the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the United Nations Declaration on the Rights of Indigenous Peoples and Principle 3 of the Rio Declaration on Environment and Development as well as the BBNJ Agreement (Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction):

*Preamble*

*Desiring* to act as stewards of the ocean in areas beyond national jurisdiction on behalf of present and future generations by protecting, caring for and ensuring responsible use of the marine environment, maintaining the integrity of ocean ecosystems and conserving the inherent value of biological diversity of areas beyond national jurisdiction;

*Convinced* of the need to safeguard intangible cultural heritage;

*Emphasizing* the right of Indigenous Peoples and local communities to free, prior, and informed consent before any deep-sea mining project which may affect intangible cultural heritage;

1. “Intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.
2. Intangible cultural heritage shall be safeguarded by the Authority, contractors and States.
3. Indigenous Peoples and local communities have the right to maintain, control, protect and develop their cultural heritage.
4. Indigenous Peoples and local communities have the right to free, prior, and informed consent before any deep-sea mining project which may affect intangible cultural heritage.
5. Future generations have the right to inherit the same diversity in natural and cultural resources enjoyed by previous generations and to have equitable access to the use and benefits of these resources and in doing so, that no community faces a disproportionate share of environmental hazards.
6. A Committee on Intangible Cultural Heritage is established.

Signed,

Solomon Pili Kaho‘ohalahala, Chairman Maui Nui Makai Network

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Edwin “Ekolu” Lindsey, President “Maui Cultural Lands”

Imogen Ingram, Te Pa Mataiapo

Hinano Teavai Murphy

With collaboration from Greenpeace, the Te Ipukarea Society, the Blue Climate Initiative,  
and The Ocean Foundation.

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